

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF DEPARTMENT OF
INSURANCE, FINANCIAL INSTITUTIONS
AND PROFESSIONAL REGISTRATION,

Petitioner,

vs.

BRIAN C. HENTON,

Respondent.

No. 13-1498 DI

DECISION

We grant the motion for summary decision filed by the Director (“the Director”) of the Department of Insurance, Financial Institutions and Professional Registration (“the Department”). There is cause to discipline Brian C. Henton’s license as an insurance producer because he failed to disclose in his renewal application that the Kansas Department of Insurance revoked his Kansas insurance agent license and because he failed to notify the Director of that discipline. There is also cause because Henton pled guilty to felony theft.

Procedure

On August 21, 2013, the Director filed a complaint. Henton was served with the complaint by certified mail on August 27, 2013. Henton did not file an answer. The Director filed a motion for summary decision on December 2, 2013. We gave Henton until December 16, 2013, to file a response, but he filed nothing.

Under 1 CSR 15-3.446(6)(A),¹ we may grant summary decision “if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts.” The parties must establish the facts by admissible evidence. 1 CSR 15-3.446(6)(B). The Director submitted a business records affidavit and business records; Henton’s unanswered request for admissions, the affidavit of its own investigator, certified records from the Kansas Department of Insurance, and certified copies of court records from Anoka County, Minnesota. Those records are admissible under 1 CSR 15-3.446(6)(B) and § 536.070.² Further, we find that Henton admitted the truth of each of the requests for admission because he did not respond to them. Mo.S.Ct.R. 59.01(1). The following facts, based on that evidence, are undisputed.

Findings of Fact

1. The Director issued a resident insurance producer license to Henton on May 24, 2005.
2. The Director renewed Henton’s license on May 24, 2013. Henton’s license will expire on May 24, 2015.
3. Henton’s license was active and valid at all times relating to this action.

The Minnesota Criminal Proceeding

4. While Henton was the manager of a Sears Outlet Store in Coon Rapids, Minnesota, he embezzled \$11, 298 from the store.
5. Based on that conduct, Henton pled guilty on January 4, 2006, in the Anoka County, Minnesota, District Court to one count of felony theft. The court suspended the

¹ References to “CSR” are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

² Statutory references, unless otherwise noted, are to the 2012 Cumulative Supplement to the Missouri Revised Statutes.

imposition of sentence, placed Henton on probation for ten years, and ordered him to complete 75 hours of community service.³

6. Henton did not notify the Director at any time of his Minnesota conviction.

The Kansas Revocation Proceeding

7. Henton possessed a Kansas resident insurance license that was issued on March 22, 2005.

8. Henton sold a Medicare supplement plan to consumer M.L.W. in 2010.

9. In 2012, Henton contacted M.L.W. and offered her an alternative plan.

10. After M.L.W. accepted, Henton altered the Medicare enrollment dates and forged M.L.W.'s signature on a copy of her Medicare card.

11. Henton also included incorrect information in M.L.W.'s application and forged M.L.W.'s signature in that application.

12. Henton submitted the forged Medicare card with the application.

13. Based on that conduct, the Kansas Commissioner of Insurance issued a summary order on September 20, 2012, proposing to revoke Henton's license.

14. The Kansas Commissioner of Insurance made the factual findings in paragraphs eight through twelve.

15. The Kansas Commissioner of Insurance found that Henton's license could be revoked under Kan.Stat.Ann. 40-4909(a)(7) because Henton "committed an insurance unfair trade practice in violation of [Kan.Stat.Ann.] 40-2404(11)," under Kan.Stat.Ann. 40-4909(a)(8)

³ The Director asserts that Henton was also assessed a fine of \$382. We disagree. Under Minnesota law, a fine is a sentence. Minn.Stat.Ann. § 609.10.1 (West. 2003). The court here suspended the imposition of sentence. Thus, we conclude that the court did not impose a fine. Further, under Minn.Stat.Ann. § 609.101.4(1), the fine could not be less than thirty percent of the maximum fine authorized by law. Henton committed the offense of felony theft under Minn.Stat.Ann. § 609.52 (West 2003). The maximum fine for that crime is \$20,000. Minn.Stat.Ann. § 609.52.3(2) (West. 2003). The minimum fine in Henton's case would have been \$6,000, considerably more than the \$382 that the court ordered Henton to pay. We suspect that the \$382 is for court costs, probation fees, a victim compensation fund, or similar programs. However, without additional information, we decline to make any finding on the purpose of the \$382 assessment except to state that it was not a fine.

because Henton used a “fraudulent or dishonest practice,” and under Kan.Stat.Ann. 40-4909(a)(10) for “having forged another person’s name to an insurance application and a document related to an insurance transaction.”⁴

16. The Kansas Commissioner of Insurance stated that the summary order would become a final order if Henton did not request a hearing within fifteen days.

17. The Kansas Commissioner of Insurance sent the summary order to Henton at the same mailing address that the Director utilized in this action.

18. Henton did not request a hearing or otherwise appeal the summary order.

19. Henton’s Kansas resident insurance license was finally revoked on October 5, 2012.

20. Henton did not notify the Director about the Kansas revocation within thirty days of the revocation becoming final or at any other time.

Henton’s 2013 Renewal Application

21. On May 22, 2013, Henton submitted to the Director an application to renew his insurance producer license.

22. The application asked, in Background Question no. 1: “Have you been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime, which has not been previously reported to this insurance department?”⁵ The application defined “crime” as “a misdemeanor, a felony, or a military offense.”⁶ The application defined “convicted” as, among other things, “having entered a plea of guilty ... or having been given probation, a suspended sentence or fine.”⁷ Henton answered “no” to that question.

23. The application asked in Background Question no. 2: “Have you been named or involved as a party in an administrative proceeding ... regarding any professional or

⁴ Ex. 4 at ¶15-16.

⁵ Ex. 1A.

⁶ Ex. 2 at ¶42.

⁷ *Id.* at ¶43.

occupational license or registration, which has not been previously reported to this insurance department?”⁸ The application defined “involved” as “having a license censured, suspended, revoked, canceled, terminated, or, being assessed a fine, placed [on] probation, sanctioned or surrendering a license to resolve an administrative action.”⁹ Henton answered “no” to that question.

24. The application contains an attestation which reads, in relevant part:

I hereby certify that, under penalty of perjury, all of the information submitted in this application and attachments is true and complete. I am aware that submitting false information or omitting pertinent or material information in connection with this application is grounds for license revocation or denial of the license and may subject me to civil or criminal penalties.^[10]

25. Henton intentionally failed to disclose both the Minnesota conviction and the Kansas revocation in his renewal application. In doing so, Henton intended for the Director to rely on his false statements that he had no prior convictions or administrative actions regarding an insurance license that had not been disclosed to the Board.¹¹

26. On May 24, 2013, the Director approved Henton’s renewal application.

27. The Director subsequently conducted an investigation of Henton and discovered that the Kansas Commissioner of Insurance revoked Henton’s Kansas insurance provider license in 2012. The Director’s investigation also revealed Henton’s 2006 Minnesota guilty plea.

Conclusions of Law

We have jurisdiction to hear this case. §§ 374.051.2 and 621.045. The Director has the burden of proof. § 374.051.2.

Henton admitted facts and that those facts authorize discipline. But statutes and case law instruct us that we must “separately and independently” determine whether such facts constitute

⁸ Ex. 1A.

⁹ Ex. 2 at ¶10.

¹⁰ Ex. 1A.

¹¹ Ex. 2 at ¶¶45, 47-48.

cause for discipline. *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988). Therefore, we independently assess whether the facts admitted allow discipline under the law cited.

The Director alleges there is cause to discipline Henton's license under § 375.141:

1. The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

(1) Intentionally providing materially incorrect, misleading, incomplete or untrue information in the license application;

(2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;

(3) Obtaining or attempting to obtain a license through material misrepresentation or fraud;

* * *

(7) Having admitted or been found to have committed any insurance unfair trade practice or fraud;

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere;

(9) Having an insurance producer license, or its equivalent, denied, suspended or revoked in any other state, province, district or territory[.]

Collateral Estoppel

As a preliminary matter, we note that we have taken factual findings of the Kansas Insurance Commissioner as true, as requested by the Director. In other words, the Director has asked us to apply the doctrine of collateral estoppel to those findings of fact.¹²

¹² Henton did not admit to these facts, however, as they were not contained in the Director's Request for Admissions addressed to him.

Collateral estoppel “is used to preclude the relitigation of an issue that already has been decided in a different cause of action.” *Brown v. Carnahan*, 370 S.W.3d 637, 658 (Mo. 2012).

There are four factors to determine whether collateral estoppel may be applied:

- (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action;
- (2) whether the prior adjudication resulted in a judgment on the merits; and
- (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication.
- (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, 500 (Mo. 1991). “Collateral estoppel only pertains to those issues which were necessarily and unambiguously decided” in the prior proceeding. *Id.* at 501. Collateral estoppel may apply when the prior proceeding was an administrative hearing. *State ex rel. Div. of Family Services v. White*, 952 S.W.2d 716, 718 (Mo.App. E.D. 1997); *Bresnahan v. May Department Stores Co.*, 726 S.W.2d 327, 330 (Mo. banc 1987).

Here, the Kansas Commissioner of Insurance found that Henton violated Kan.Stat.Ann. 40-4909(a)(7), (8), and (10). The Kansas Commissioner found that:

- Henton sold a Medicare supplement insurance policy to M.L.W. Ex. 4 at ¶5.
- Henton later contacted M.L.W. and offered her a “better and cheaper” alternative and she agreed to change policies. *Id.* at ¶6.
- Henton altered the Medicare enrollment dates and forged M.L.W.’s signature on a copy of M.L.W.’s Medicare card. *Id.* at ¶7.
- Henton included incorrect information in M.L.W.’s application and forged M.L.W.’s signature on the application. *Id.* at ¶8.
- Henton submitted the altered copy of the Medicare card with the application. *Id.* at ¶7.

The factual issues in the Kansas action – whether Henton forged M.L.W.’s name to an insurance application and altered a copy of her Medicare card – are two of the factual issues that exist in this action. The first collateral estoppel factor is met.

The second collateral estoppel factor is whether the Kansas action resulted in a decision on the merits. “On the merits” means that the decision was rendered not upon a preliminary or technical point, or by default, but after argument and investigation, and determination of which party was in the right. *Wilkes v. St. Paul Fire and Marine Ins. Co.*, 92 S.W.3d 116, 121 (Mo.App. E.D. 2002). A final judgment settles all of the issues in the case, and leaves nothing to be decided later. *Buemi v. Kerckhoff*, 359 S.W.3d 16, 20 (Mo. banc 2011). Finality also means that the decision is not subject to further appeal. *Korte v. Curators of Univ. of Mo.*, 316 S.W.3d 481, 489 (Mo.App. W.D. 2010).

Here, Henton had the opportunity to dispute the facts alleged in the Kansas proceeding. Ex. 4 at ¶9. The Kansas Commissioner investigated all of the facts at issue in the Kansas proceeding. *Id.* at ¶¶4, 9. The Kansas proceeding ended in the revocation of his Kansas license, which disposed of all the issues before the Kansas Insurance Commissioner. Ex. 4 at 1-2. Henton did not file an appeal from that decision. Ex. 2 at ¶17. We therefore conclude that the Kansas decision resulted in a judgment on the merits and that the Director satisfied the second collateral estoppel factor.

The third factor is met because Henton was a party to the Kansas action.

The fourth factor is met because Henton had a full and fair opportunity to answer the factual allegations and the Kansas process provided for a full evidentiary hearing and judicial review, neither of which Henton utilized.

For these reasons, we conclude that the Director may establish, through the Kansas Commissioner’s order, that Henton forged M.L.W.’s name on an insurance policy application,

that he altered a copy of M.L.W.'s Medicare card and forged M.L.W.'s signature on that card, and that he submitted the altered copy of the card with the insurance application.

License Application – Subdivisions (1) and (3)

Section 375.141.1(1) allows for discipline if Henton “[i]ntentionally provid[ed] materially incorrect, misleading, incomplete or untrue information in the license application[.]”

Section 375.141.1(3) allows for discipline if Henton “[o]btain[ed] or attempt[ed] to obtain a license through material misrepresentation or fraud[.]” The Director argues that Henton intentionally provided materially incorrect, misleading, incomplete or untrue information on his 2013 renewal application when he failed to declare his Minnesota conviction for felony theft in response to Background Question 1 and the revocation of his Kansas license in response to Background Question 2.

Henton admitted that he intentionally provided “materially incorrect, misleading, incomplete, or untrue information”¹³ on his renewal application. The undisputed facts show that Henton did not disclose his Minnesota conviction or his Kansas revocation to the Director but instead stated that he did not have any license discipline or convictions that he had not previously disclosed to the Director. Those statements were incorrect, misleading, and untrue. The dictionary definition of “material” is “having real importance or great consequences [.]” MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 765 (11th ed. 2004). A criminal conviction in which Henton embezzled nearly \$12,000 and the revocation of his Kansas insurance agent's license are facts that would have had great importance to the Director in considering whether to renew Henton's license and therefore were material. There is cause for discipline under § 374.141.1(1).

¹³ Ex. 2 at ¶47.

Henton also admitted that he “obtained ... a Missouri producer’s license through material misrepresentation or fraud.”¹⁴ A “misrepresentation” is a falsehood or untruth made with the intent of deceit rather than an inadvertent mistake. *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W. 2d 894, 899, n. 3 (Mo. App. W.D. 1997). Fraud is “generally under the common law as an intentional perversion of truth to induce another, or to act in reliance upon it.” *Id.* at 899 n.2.

Henton did not disclose his Minnesota conviction or his Kansas revocation. We find it improbable that Henton’s omission of these events was inadvertent, especially as he was still on probation for the Minnesota offense and the Kansas revocation occurred less than six months before he filed his renewal application. Based on the totality of the circumstances presented here, we find that Henton’s conduct constituted both a misrepresentation and a fraud because he intended for the Director to rely on his false statements. As discussed in the previous paragraph, Henton’s misrepresentation was material. There is cause under § 374.141.1(3).

Violation of Statutes – Subdivision (2)

Section 375.141(2) allows for discipline if Henton violated any “insurance laws.” The Director asserts that Henton violated § 375.141.6 as well as Kan.Stat.Ann. 40-2404(11).

Section 375.141.6 requires every insurance producer to:

report to the director any administrative action taken against the producer in another jurisdiction or by another governmental agency in this state within thirty days of the final disposition of the matter. This report shall include a copy of the order, consent order or other relevant legal documents.

Section 375.141.6 is an “insurance law” because it specifically applies to insurance providers and places a duty on those providers. Henton did not report the Kansas revocation of his insurance provider license to the Board within thirty days of the revocation or at any other time.

¹⁴ Ex. 2 at ¶47.

The Director discovered the revocation only when its investigator reviewed Henton’s renewal application. Henton thus violated § 375.141.6.

The Director also alleges that Henton violated Kan.Stat.Ann. 40-2404(11) (West 2012), which provides:

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

* * *

(11) Misrepresentation in insurance applications. Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money or other benefit from any insurer, agent, broker or individual.

This statute is merely a definitional statute; Henton could not “violate” it. However, the complaint specifically alleges that Henton “committed an insurance unfair trade practice or fraud[.]”¹⁵ Kan.Stat.Ann. 40-2403 (West 2012) prohibits the conduct described in Kan.Stat.Ann. 40-2404: “No person shall engage in this state in any trade practice which is defined in this act as ... an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.” We conclude that Henton had adequate notice that the Director sought to discipline him for committing an unfair trade practice, regardless of whether the Director cited the correct statute. We therefore examine whether Henton violated Kan.Stat.Ann. 40-2403, using the definition of “unfair or deceptive acts” in Kan.Stat.Ann. 40-2404(11).

Kan.Stat.Ann. 40-2403 and 40-2404(11) are “insurance laws” because they specifically regulate Kansas insurance providers. Henton was a Kansas insurance provider and therefore was subject to Kansas laws governing the business of insurance, including Kan.Stat.Ann. 40-2403 and 40-2404(11). Henton admitted that he violated Kan.Stat.Ann. 40-2404(11).

¹⁵ Complaint at ¶24.

We find that Henton violated Kan.Stat.Ann. 40-2403. Henton forged a consumer's signature on an insurance application and on the consumer's Medicaid card. We have no difficulty in concluding that a forged signature is a "false statement" on an insurance application. Further, as Henton was an insurance agent, we find that he submitted the false statement in order to gain a commission or other benefit. Henton therefore engaged in an unfair trade practice under Kan.Stat.Ann. 40-2404(11) and violated Kan.Stat.Ann. 40-2403.

The Director has cause to discipline Henton under § 375.141(2) because he violated § 375.141.6 and Kan.Stat.Ann. 40-2403.

Unfair trade practices—subsections (7) and (8)

Section 375.141.1(7) allows for discipline if Henton "admit[s] or [is] found to have committed any insurance unfair trade practice or fraud."

As discussed in the preceding section, Henton violated Kan.Stat.Ann. 40-2403 by committing "any trade practice" that Kan.Stat.Ann. 40-2404(11) defines as an "unfair or deceptive act or practice in the business of insurance." Thus, based on the express language of these two Kansas statutes, Henton committed an "insurance unfair trade ... practice."

Further, Henton's conduct constitutes an unfair trade practice under Missouri law. Section 375.934¹⁶ states that "[i]t is an unfair trade practice for any insurer to commit any practice defined in section 375.936 if ... [i]t is committed in conscious disregard of sections 375.930 to 375.948." This statute is functionally identical to Kan.Stat.Ann. 40-2403. Section 375.936(7)¹⁷ states that "misrepresentation in insurance applications" is an unfair trade practice and defines it as "making false or fraudulent statements or representations on or relative to an application for a policy, for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, agency, broker or other person[.]" This statute is virtually identical to

¹⁶ RSMo 2000.

¹⁷ RSMo 2000.

Kan.Stat.Ann. 40-2404(11). As we have already found that Henton violated Kan.Stat.Ann. 40-2403 by committing an unfair trade practice, we also find that Henton committed an unfair trade practice under the virtually identical Missouri statutes.¹⁸ There is cause to discipline his license under § 375.141.1(7).

Section 375.141.1(8) allows for discipline if Henton used “fraudulent, coercive, or dishonest practices, or demonstrate[ed] incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.” Dishonesty is a lack of integrity or a disposition to defraud or deceive. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 359 (11th ed. 2004). Kan.Stat.Ann. 40-2403 and 40-2404(11) specifically forbid “[m]aking false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money or other benefit from any insurer, agent, broker or individual.” We found that Henton violated Kan.Stat.Ann. 40-2403. Thus, Henton made false or fraudulent statements to obtain a fee or other benefits for himself. His conduct was inherently dishonest.

“Untrustworthy” is defined as “not trustworthy” and “trustworthy” is defined as “worthy of confidence.” WEBSTER’S THIRD NEWS INT’L DICTIONARY 2457, 2514 (1986). Henton’s conduct was not worthy of confidence because he forged a consumer’s signature. There is cause to discipline his license under § 375.141.1(8).

The Director has cause to discipline Henton under § 375.141.1(7) and (8).

Revocation of Kansas license—subsection (9)

Section 375.141.1(9) allows for discipline if Henton “[has] an insurance producer license ... revoked in any other state, province, district or territory.” The Kansas Commissioner of

¹⁸ The only difference between § 375.934 and Kan.Stat.Ann. 40-2403 is that the Missouri statute adds the caveat that the unfair trade practice must be “committed in conscious disregard of sections 375.930 to 375.948.” We find that insurance agents, and people generally, know that they cannot forge other people’s signatures to documents. We thus conclude that Henton acted “in conscious disregard” of § 375.936(7).

Insurance revoked Henton's Kansas insurance agent license. There is cause to discipline Henton's license under § 375.141.1(9).

Summary

There is cause to discipline Henton's license under § 375.141.1(1), (2), (3), (7), (8), and (9). We cancel the hearing set for January 17, 2014.

SO ORDERED on January 9, 2014.

/s/ Karen A. Winn
KAREN A. WINN
Commissioner